edition, page 271), and no proof of actual damages is demanded *Rolin and another v. Steward*[1]. In *Rolin v. Steward* (cited *supra*) William, J. said :—

> .....since the dishonouring of cheques is particularly calculated to be injurious to a person in trade, if it be alleged and proved that the plaintiff is a trader, the jury may take that fact into their consideration in estimating their damages,.....

and in directing the jury Lord Campbell said that the jury "should give such temperate damages as they may judge to be a reasonable compensation for the injury the plaintiff must have sustained from the dishonour of his cheque."

In Sheldon's Practice and Law of Banking 5th edition, page 52 it states :—

> The banker, before taking such a serious step as dishonouring a cheque for lack of funds, must make absolutely certain that the state of the account justifies him in so doing. Substantial damages would usually be awarded against a banker who had improperly dishonoured a cheque and thereby injured the credit of a business man.

Now it was not shown that the plaintiff has suffered in his business as claimed in paragraph 6 of his pleadings, but he has shown injury to credit and reputation. I was not impressed by the books Exhibit A.14 a to d which certainly appear to support Mr. Pooley's contention that they had been prepared for the case. They have detracted from the plaintiff's credibility.

After due deliberation of all the circumstances, and after consideration and comparison with other reported cases I find a fair sum the plaintiff is entitled to for damages is $1,000.00.

He is also entitled to costs.

Judgment for the plaintiff against the defendants for $1,000.00 and costs on scale of Sessions Court.

*Judgment for the Plaintiff.*

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## PUBLIC PROSECUTOR v. LEE AH SAM (f).

[App. Crim. Juris. (Willan, C.J., Pretheroe and Spenser-Wilkinson, JJ.) August 25, 1949]

[F.M. — Criminal Reference No. 1 of 1949]

*Sentence — Sentence under Emergency Regulations, Regulation 5(1) — Interpretation and General Clauses Enactment, S. 51 — Penal Servitude and Rigorous Imprisonment — Whether whipping is mandatory — Courts Ordinance, 1948, S. 35.*

In this case the accused was found guilty of the offence of consorting with another person who had in his possession arms and explosives, an offence under Regulation 5(1) of the Emergency Regulations, 1948. This regulation provides that the person guilty of the offence "shall be liable to be punished with death or with penal servitude for life and whipping". The learned trial Judge was of opinion that this was not a case in which he should impose the death penalty and reserved as a question for the Court of Appeal whether the Regulation permits of any lesser sentence than penal servitude for life being imposed and also whether a sentence of whipping is mandatory.

**Held,** (1) that the sentence of penal servitude for life is a maximum sentence and any lesser sentence of penal servitude may be imposed; (2) that such lesser sentence must be penal servitude and cannot be rigorous imprisonment; and (3) that the sentence of whipping is discretionary and not mandatory.

REFERENCE TO COURT OF APPEAL.

*N. L. Cohen* for the Public Prosecutor.

*E. D. Shearn* for the Accused.

*Cur. Adv. Vult.*

**Willan, C. J.** : — This is a Reference to the Court of Appeal under section 35 of the Courts Ordinance, 1948, which reads :—

> 35. (1) When any person has in a trial before the High Court in the exercise of its original criminal jurisdiction been convicted of an offence, the Judge may, if he thinks fit, reserve for the decision of the Court of Appeal any question of law which has arisen in the course of the trial of such person and the determination of which would affect the event of the trial.
>
> (2) The person so convicted shall thereupon be remanded to prison or, if the Judge thinks fit, be admitted to bail.
>
> (3) The Court of Appeal shall review such case, or such part of it as may be necessary, and finally determine the question and thereupon may alter the sentence passed and pass such sentence or give or make such judgment or order as the Court of Appeal thinks fit.

The facts are that a Chinese woman, Lee Ah Sam, was convicted of consorting with persons who had possession of fire-arms and explosives in circumstances which raised a reasonable presumption that she intended to act in a manner prejudicial to the maintenance of public order — an offence contrary to Regulation 5(1) of the Emergency Regulations, 1948, which reads :—

> Any person who consorts with or is found in the company of another person who is carrying or has in his possession arms or explosives in contravention of the provisions of Regulation 4 of these Regulations, in circumstances which raise a reasonable presumption that he intends to or is about to act with, or has recently acted with, such other person in a manner prejudicial to public safety or the maintenance of public order, shall be guilty of an offence against these Regulations and shall be liable to be punished with death, or with penal servitude for life and whipping.

The learned trial Judge was of the opinion that this was not a case in which he should impose the death penalty and reserved, as a question for the Court of Appeal under section 35 of the Courts Ordinance, 1948, whether Emergency Regulation 5(1) permits of any lesser sentence than penal servitude for life being imposed, and also whether a sentence of whipping is mandatory.

Mr. Shearn, assigned to represent the convicted person, submitted that:—

(a) the sentence of penal servitude for life is a maximum sentence and any lesser sentence of penal servitude may be imposed;

(b) such lesser sentence must be penal servitude — it cannot be rigorous imprisonment;

(c) the imposition of a sentence of whipping is discretionary.

Mr. Cohen, for the Public Prosecutor, agreed with (a), and also with (b) after first submitting otherwise, and as regards (c) he argued that a sentence of whipping is mandatory.

With regard to his first submission, Mr. Shearn stressed that the words "shall be liable to" in Emergency Regulation 5(1) show the maximum extent to which a person convicted under that Regulation can be sentenced. He compared that language with the language used in section 35(i) of the Federated Malay States Minor Offences Enactment (Cap. 46), which reads:—

> Any person who has in his possession or conveys in any manner anything which may be reasonably suspected of being stolen or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine of fifty dollars, or to imprisonment for three months.

Having drawn our attention to the similarity of the language used in that section with that used in Emergency Regulation 5(1) Mr. Shearn pointed out that no one had ever suggested that the term of three months imprisonment in that section is not a maximum.

He drew our attention to several other laws in which the penalty provisions are similarly phrased.

Mr. Shearn then submitted that this particular question is conclusively settled by section 51 of the Interpretation and General Clauses Ordinance, 1948, (Malayan Union Ordinance No. 7 of 1948), which reads:—

> Whenever in any written law a penalty is provided for an offence against such law, such provision shall indicate that such offence shall be punishable, upon conviction, by a penalty not exceeding (except as may be otherwise expressly mentioned in such law) the penalty provided.

He also drew our attention to the marginal note to that section, which reads: "Penalties prescribed to be deemed maximum penalties".

Mr. Shearn argued that since that section is applicable to all laws, therefore, where by any provision of law a penalty is prescribed, unless there is some express provision in that law itself stating otherwise, the penalty prescribed is a maximum. In Emergency Regulation 5(1) — leaving aside for the moment the punishments of death and of whipping — in so far it prescribes punishment of penal servitude for life, that is a maximum punishment.

We agree with Mr. Shearn's submission and hold accordingly.

With regard to his second submission, namely that in imposing a sentence less than penal servitude for life under Emergency Regulation 5(1) such sentence must be penal servitude, as opposed to rigorous imprisonment, Mr. Shearn argued that the legislature in prescribing both penal servitude and rigorous imprisonment, has prescribed different methods of punishment. He cited section 59 of the Federated Malay States Prisons Enactment (Cap. 35) as proof that penal servitude and rigorous imprisonment are different punishments. It reads:—

> 59. (i) Every sentence of penal servitude passed upon any person shall subject such person during the term of the sentence to be imprisoned with such labour, which may be hard or otherwise, as may be prescribed.
>
> (ii) Every sentence of rigorous imprisonment passed upon any person shall subject such person during the term of the sentence to be imprisoned with hard labour.

That there is a distinction between penal servitude and rigorous imprisonment is also borne out by reference to Rule 113 of the Prison Rules, contained in volume I of the Federated Malay States Rules at page 355. It reads:—

> Long-sentence prisoners shall be such as are sentenced to rigorous imprisonment for periods exceeding one year, or to penal servitude. Long-sentence prisoners sentenced to penal servitude shall be divided into Middle and Upper grades and those sentenced to rigorous imprisonment shall be divided into Lower, Middle and Upper grades. Each grade, as far as circumstances permit, shall be confined and work separately.

The next ensuing Rules 114, 115 and 116 prescribe the kinds of work which the prisoners in each grade must perform, and show that prisoners in the Middle grade may, and in the Upper grade do, perform different work from prisoners in the Lower grade; the last named grade does not include prisoners sentenced to penal servitude.

Having decided that penal servitude and rigorous imprisonment are two different forms of punishment, we now turn to a further consideration of section 51 of the Interpretation and General Clauses Ordinance, 1948.

In that section, we are of opinion, that the word "penalty", where it is used three times in that section, must refer to the same class of penalty on each occasion it is used. For example, if penal servitude is the

penalty provided in a particular law, then the penalty imposed must be penal servitude and cannot be any other penalty; similarly, if rigorous imprisonment is the penalty provided, then the penalty imposed must be rigorous imprisonment.

We so decide because in our view the words "not exceeding" can only be given their natural and plain meaning when considering the same class of punishment. For instance, it is clear that if the maximum penalty prescribed for an offence is 5 years rigorous imprisonment, a sentence of 3 years rigorous imprisonment does not exceed that maximum — the "yard-stick" being length of time and nothing more. If one goes outside the same class of punishment there is no criterion by which one can decide whether the one does or does not "exceed" the other. By going outside the same class of punishment, the difficulty arises of equating, for instance, a sentence of imprisonment with a fine, because, if penal servitude can be replaced by ordinary imprisonment, there is no reason why imprisonment should not be replaced by a fine. Such a construction of section 51 of the Interpretation and General Clauses Ordinance, 1948, would lead to absurdities and would be contrary to settled practice which has existed in the Courts of this country for many years.

Further, apart from some special provision of law, such as, for example, section 59 of the Penal Code, or sections 293 and 294 of the Criminal Procedure Code, where one type of punishment is prescribed, the Court has no power to impose any other type of punishment. Regulation 5(1) in its alternative does not prescribe imprisonment and, therefore, imprisonment cannot be imposed unless authority to do so is given by some other provision of law. Section 59 of the Penal Code clearly does not apply to Regulation 5(1) and, as we have already pointed out, section 51 of the Interpretation and General Clauses Ordinance does not give power to alter the type of punishment.

For these reasons we decide that where a sentence of death is not imposed under Emergency Regulation 5(1), the sentence must be one of penal servitude, which may be less than penal servitude for life, but cannot be any other punishment.

With regard to the last question as to whether whipping is mandatory under that Emergency Regulation, we would point out that no offence prescribes a maximum sentence of so many strokes for a whipping. It is necessary to turn to section 288 of the Criminal Procedure Code to ascertain that in no case shall a whipping exceed twenty-four strokes.

The question of a whipping is therefore always discretionary up to this maximum, and consequently section 51 of the Interpretation and General Clauses Ordinance, 1948, has no application to a penalty of whipping. We are thrown back on Emergency Regulation 5(1) itself.

The penal provision of that Regulation can be read, without altering the sense, as follows:—

shall be liable to be punished
(a) with death, or
(b) with penal servitude for life and whipping.

The Deputy Public Prosecutor contended that the use of the word "and" implies that the whipping is mandatory; that having discarded the first alternative, death, one is left with the second alternative, namely penal servitude for life *and* whipping, and therefore both must be imposed. It must be pointed out, however, that it would have been absurd in the context to use the word "or" instead of "and". In our view the word "and" is used simply to show that the whipping can be imposed in addition to a sentence of penal servitude. Moreover the Deputy Public Prosecutor's argument ignores the words "shall be liable" which, quite apart from the provisions of section 51, indicate that the *maximum* extent of the liability is penal servitude for life and whipping. Finally, a comparison with the rather stronger wording of section 396 of the Penal Code confirms our view that the whipping under Regulation 5(1) is discretionary. The relevant words of section 396 are "shall be punished with death or penal servitude for life . . . . and . . . . with whipping with a cat-o'-nine tails". It has never been suggested that the whipping under that section is mandatory and in our opinion it is not.

Having decided these three questions, we turn now to the appropriate penalty which ought to be imposed in this case. The learned trial Judge, in the reference, has stated that in his opinion a suitable sentence would be seven years rigorous imprisonment. For the reasons already stated that cannot be imposed. Although we have stated that penal servitude and rigorous imprisonment are two different forms of punishment, an examination of the Prison Rules shows, that long-sentence prisoners undergoing penal servitude and rigorous imprisonment are treated in very much the same way and that there is no difference as to the method of earning remission of sentence or as to the amount of such remission, although there is a difference with regard to grading.

For these reasons we sentence the convicted person in this case to seven years penal servitude to commence from the date of conviction — that is from the 12th of July, 1949.

*Reference Answered.*

## IN RE JOSEPH ROWLANDS DEVADAS.

[Orig. Civ. Juris. (Willan, C.J.) September 3, 1949]
[K.L. — Petition for Admission No. 3 of 1949]

*Advocates and Solicitors Ordinance, 1947 — Ss. 5(2), 5(4), 7(4) and 7(5) — Shortening of period — Grounds for.*

Decision on what are the special grounds on which the Court may shorten or dispense with the period during which the notice referred to in S. 5(2) of the Advocates & Solicitors Ordinance, 1947, is required to remain posted.

*Case referred to:—*

(1) *In re Kim Chwee Chia* (1947) M.L.J. 108.

PETITION FOR ADMISSION.

*K. K. Benjamin* for the Petitioner.

*W. G. W. Hastings* for the Bar Council.

*Ng Kok Thoy* for Bar Committees.

*Cur. Adv. Vult.*

**Willan, C. J.:** — In this Petition the petitioner moved the Court under sub-section 5(5) of the Advocates and Solicitors Ordinance, 1947, to shorten the period during which the notice referred to in sub-section 5(2) is required to remain posted.

The facts are that the petitioner filed a previous Petition for Admission, No. 2 of 1948, on the 20th January, 1948. In that petition the date of posting of the last of the notices referred to in sub-section 5(2) was the 4th February, 1948. The proviso to sub-section 5(4) states that a petition lapses twelve months after the last date of posting, if within that period the petitioner has not applied to set his petition down for hearing.

In that Petition, No. 2 of 1948, the petitioner failed to fulfil the requirements of sub-section 7(1), and desired me to accord him an interview in accordance with sub-section 7(4). That interview took place on the 21st January, 1949, and on that date I made an order under that sub-section staying further proceedings on Petition No. 2 of 1948 up to and including the 30th June, 1949.

On the 24th January, 1949, the petitioner wrote to the Secretary of the Federation Bar Council asking whether in view of the fact that he was unable to set down his Petition No. 2 of 1948 for hearing, on account of the stay order made by me, such petition would lapse in view of the proviso to sub-section 5(4). On the 26th January, 1949, the Secretary of the Bar Council replied that he did not think sub-section 5(4) applied and that once the petitioner had complied with the requirements of sub-section 7(1), Petition No. 2 of 1948 could be restored under sub-section 7(5). In view of that reply the petitioner did not seek to take any further action regarding Petition No. 2 of 1948.

On the 25th March, 1949, the Secretary of the Bar Council again wrote to the petitioner stating that after further consideration he was not certain whether his opinion given in his letter of the 26th of January, 1949, was correct, and that it might be held that sub-section 7(5) was subject to the proviso to sub-section 5(4).

Upon receipt of that further letter the petitioner filed the present Petition, No. 3 of 1949, and the last of the notices referred to in sub-section 5(2) was posted, in this petition, on the 10th April, 1949. On the 29th July, 1949, the petitioner fulfilled the requirements of sub-section 7(1) and, as already stated, he now moves the Court to shorten the period during which the notices must remain posted in this present petition. The grounds in support of this motion, put forward by Mr. Benjamin on his behalf, are:—

(1) The object of posting notices under sub-section 5(2) is to give notice that a petitioner intends to apply to be admitted as an Advocate and Solicitor in case any person wishes to raise any objection, and that in this case more than adequate notice has been given in view of the fact that in Petition No. 2 of 1948 notices have remained posted with effect from the 4th February, 1948, that is for a period exceeding 18 months, three times the statutory period of six months prescribed by sub-section 5(2).

(2) That if it had not been for the advice contained in the letter he received from the Secretary of the Bar Council dated the 26th January, 1949, the petitioner would have filed Petition No. 3 of 1949 on the 4th of February, 1949 (the date on which Petition No. 2 of 1948 lapsed) or immediately thereafter, and consequently this motion to shorten the time would not have been necessary.

In so far as sub-section 5(5) of the Advocates and Solicitors Ordinance, 1947, relates to the shortening of the time during which the notice referred to in sub-section 5(2) is required to be posted, it reads:—

> The Court may, on the application and on special grounds, one of which may be that the petitioner has been engaged in any part of His Majesty's dominions in the active practice of his profession after having qualified as a Barrister of England or Northern Ireland (or of Ireland if called before the 1st day of October, 1921) or as a member of the Faculty of Advocates in Scotland or a solicitor of the Supreme Court of Judicature of England or Northern Ireland (or of Ireland admitted before the 1st day of October, 1921), or Writer to the Signet or a solicitor in Scotland or as an advocate and solicitor in the Colony, to be stated on affidavit or statutory declaration to be filed in Court seven clear days before the same is used, by order shorten the period during which the notice referred to in sub-section (2) of this section is required to be posted.....and may, if it thinks fit, admit and enrol the petitioner at any time.

I accept the first ground put forward by Mr. Benjamin as one of the two special grounds required by sub-section 5(5).